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No. 84-1974

In The

Supreme Court of the United States

October Term, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

vs.

STANLEY BARHAM CLARK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT IN RESPONSE TO BRIEF FOR THE RESPONDENT

A. Introduction

In petitioner's opening brief, it was explained that (1) jury instructions, like those given here, containing an erroneous presumption are subject to a harmless error analysis (Pet. Br. 10-18), and (2) the error in these instructions was harmless, since respondent's defenses did

not raise a genuine factual dispute on the issue of malice and since the state's proof of malice was conclusive (Pet. Br. 18-29). Although respondent contests both propositions, there are several points that he does not dispute. *First*, in *United States v. Frady*, 456 U.S. 170 (1982), this Court held that the defendant, whose defense, like respondent's, was nonparticipation in the crime, was not prejudiced by jury instructions that are not materially different from those given here (Pet. Br. 20-21; U.S. Br. 18-19, 22-25). *Second*, virtually every federal court of appeals and most state courts have ruled that jury instructions like those given here can be harmless in an appropriate case. (U.S. Br. App. 1a-7a; Calif. Am. Br. 35-36 & n. 4).[1] *Third*, given the factual findings that the jury had to make in order to find respondent guilty of first degree murder, unless the error in this case also affected those findings, respondent's claim of prejudice must necessarily fail as a matter of law (Pet. Br. 20 & n. 19; U.S. Br. 23-24). *Fourth*, the instructions on malice given in this case were given in Tennessee murder prosecutions (and elsewhere nationwide) since the time of Andrew Jackson (Pet. Br. 26; U.S. Br. 16-17; Pet. App. A12, n. 7). Thus, even if such instructions are now erroneous under this Court's 1979 decision in *Sandstrom v. Montana*, 442 U.S. 510, their historic use is powerful evidence that these errors cannot be excepted from the harmless error doctrine in every case.

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[1]Although the Eighth Circuit has ruled that such errors cannot be harmless, the United States has filed a petition for a writ of certiorari in a case presenting that issue from that court, *United States v. Ben M. Hogan Co.*, No. 85-1067, petition for cert. pending.

B. Respondent Was Not Prejudiced By The Malice Instructions

In his brief the respondent argues that the jury instructions prejudiced him in three respects. First, there is the claim that the instructions prejudiced the jury's consideration of malice. Second, respondent contends that the presumption affected the jury's consideration of his defenses. Third, respondent argues that the malice instructions affected the jury's consideration of the other elements of first degree murder.[2]

1. Respondent does not really deny that the proof is sufficient to establish that he shot both victims in the head at point-blank range, that such proof is sufficient to establish malice, and that the malice instructions had no bearing on the issue of who killed Joy Faulk and Charles Browning. Instead, respondent argues that he was prejudiced because the malice instructions affected his defense

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[2]Respondent suggests that his failure to object at trial to the instructions on malice can be explained on the ground that Tennessee law does not require a timely objection to jury instructions in order to raise a claim on appeal. (Resp. Br. 28). While that statement is correct as a matter of state law, *see Tenn. R. Crim. P. 30(b)*, respondent's argument is beside the point in this case. The point is not that respondent waived his right to appeal this issue, rather the point is that respondent surely would have sought to persuade the trial court not to give these instructions if he thought they were prejudicial to him. Respondent's argument that such an objection would be futile is likewise unavailing. At the time of the instant trial, several courts had ruled that instructions like those given here should not be used. *See, Sandstrom v. Montana*, 442 U.S. 510, 517-518 (1979) (collecting cases). In fact, respondent did raise this issue on appeal following *Sandstrom*. Respondent's failure to object at trial to these instructions therefore shows that he did not believe they were prejudicial.

that he shot Faulk and Browning in self-defense or due to provocation sufficient to cause him in a state of passion that would render the killings no more than voluntary manslaughter (Resp. Br. 14, 15-17). Petitioner submits, however, that that argument is not supported by the record.

The central flaw in respondent's argument is that he was convicted of the first degree murder of Faulk, and there is no evidence in the record that would support the claim that she provoked him to kill her. In fact, the only evidence that bears on this issue is the proof that respondent repeatedly threatened to kill Faulk if he found her with another man (See Pet. Br. 5, 27). Respondent does not argue to the contrary; instead, he contends that the evidence was sufficient to support a self-defense or manslaughter verdict on the killing of *Browning*. However, respondent never presented a self-defense or adequate provocation theory to the jury in this case. The foregoing discussion also demonstrates that any defense claim that respondent killed Browning in self-defense or in a state of passion would have had no bearing on his liability for the murder of Faulk, who was unarmed and who had never threatened respondent.

Further, the record shows that Browning was found in the truck with a gun in his pocket, and the cylinder turned in such a manner that the sole spent cartridge could not have just been fired from the gun (J.A. 26, 30). In fact, none of the state appellate judges, nor the federal judges, who have examined this record as much as referred to a self-defense or provocation defense. Indeed, the trial judge instructed the jury on a manslaughter theory merely out of an abundance of caution (J.A. 83). Thus,

it is submitted that respondent's self-defense and adequate provocation defenses are factually very weak.

2. The malice instructions did not prejudice respondent's insanity and voluntary intoxication defenses.

a. Respondent and amicus National Association of Criminal Defense Lawyers, et al., maintain that the malice instructions prejudiced respondent's defenses that he lacked the mental states necessary for murder due to mental illness and voluntary intoxication (Resp. Br. 14-15 and n. 2, 22-23, 30-35; Nat'l Ass'n Am. Br. 12-19). However, respondent does not deny that the instructions at his trial did not allow the jury to consider his claim of intoxication in connection with second degree murder, Pet. Br. 22-24; *see* J.A. 195; nor did those instructions permit the jury to consider his claim of mental illness at all except in connection with his insanity defense (Pet. Br. 20-22; *see* J.A. 190-193). Furthermore, respondent has cited no Tennessee decision holding that voluntary intoxication is a defense to second degree murder or that mental illness may be presented in the form of a diminished capacity defense, rather than an insanity defense. In fact, the decided cases have expressly held to the contrary, Pet. Br. 22-25, as respondent reluctantly concedes, (Resp. Br. 33, 35-40.).[3]

b. Respondent and amicus ACLU claim that the malice instructions prejudiced respondent's insanity defense, hypothesizing the jury relied on the presumption of malice when considering that defense (Resp. Br. 48-50;

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[3]Respondent's argument that these state law doctrines are unconstitutional, *see* Resp. Br. 35-43, is discussed *infra*, at p. 9.

ACLU Am. Br. 25-26). It is respectfully submitted, however, that that argument is flawed in three respects.

First, there is no support in the jury instructions for the claim that the malice instructions affected the jury's consideration of respondent's insanity defense. The instructions on malice related only to that element of the charged offenses. The trial court instructed the jury to consider respondent's insanity defense only if and after it found that he was guilty of one or more of the charged crimes (J.S. 190). Nowhere did the trial court instruct the jury that the presumption of malice had any relevance to its consideration of the insanity defense or to any other aspect of the case. Nor is there any reason to conclude that the jury would have believed that this presumption had any bearing on respondent's insanity defense. The jury instructions on malice and insanity do not at all refer to one another and the trial court separately and carefully explained the different burdens of production and proof on the issue of insanity (Compare J.A. 184-185, 186-187 [malice], with J.A. 190-193 [insanity]). Accordingly, it is submitted that there is no realistic possibility that the jury could have been confused on this point.[4]

Secondly, respondent's claim of prejudice is inconsistent with the nature of the insanity defense he asserted at trial. Respondent's insanity defense was based upon

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[4]Given the fact that the jury was clearly told to consider the insanity defense separately from the question of guilt, respondent's claim on this point is essentially an assertion that the jury necessarily rejected his insanity defense because it had already found him guilty of murder. Such an assertion, however, has nothing to do with the malice instructions, and it assumes that the jury defied the trial court's express charge to consider respondent's insanity defense on its own merits.

an asserted volitional impairment, not a cognitive impairment. Put differently, he did not claim that he lacked the ability to appreciate the wrongfulness of his conduct; rather, he maintained that he lacked the capacity to conform his conduct to the requirements of law, *i.e.*, that he could not stop himself from killing Faulk and Browning (Resp. Br. 48). Since the malice instructions did not help the State prove that respondent had the volitional capacity to keep from shooting Faulk and Browning, those instructions could not have prejudiced his insanity defense.

Last on this point, respondent's argument must fail since *Sandstrom* does not apply to the issue of insanity. *Sandstrom* was based upon the due process principle enunciated in *In re Winship*, 397 U.S. 358 (1970), that the State must prove every element of a charged offense beyond a reasonable doubt. *See*, 442 U.S. at 520; *accord*, *Francis v. Franklin*, 471 U.S. —, 105 S.Ct. 1965 (1985). However, it is settled that the States does not have to prove that a defendant was sane at the time that he committed a crime and that the burden of proof on an insanity defense can be placed on the accused. *See*, *Patterson v. New York*, 432 U.S. 197, 205, 207 (1977); *Rivera v. Delaware*, 429 U.S. 877 (1976), dismissing appeal for want of a substantial federal question from *Rivera v. State*, 351 A.2d 561 (Del. 1976); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); the Comprehensive Crime Control Act of 1984, 98 Stat. 2057 (to be codified at 18 U.S.C. 20) (requiring the defendant to prove that he is insane). Accordingly, any affect that the jury instructions on malice may have had on respondent's insanity defense is purely a matter of state law, not federal constitutional law.

c. Finally, respondent asserts that the Tennessee law of homicide is unconstitutional in two respects. First, he claims that the principle that voluntary intoxication is not a defense to second degree murder stems from the same presumption of malice that was held unlawful in *Sandstrom*. Second, he argues that this definition of second degree murder is unconstitutional because it denies an accused the right to adduce relevant evidence bearing on his mental state (Resp. Br. 32-43). Accordingly, he claims that the malice instructions prejudiced him because it deprived him of the right to have the jury consider the fact that he was voluntarily intoxicated in deciding whether he acted with malice aforethought. However, it is respectfully submitted that respondent's argument is flawed in several respects.

Respondent has never before advanced either argument in support of his claim that the jury instructions on malice are invalid. Respondent did not present either argument at trial, on appeal to the state court of appeals, in the district court, or in the court of appeals. Accordingly, aside from the fact that the Tennessee courts would be likely to hold that he had waived these claims by failing to object on these grounds at trial, respondent clearly has not exhausted these claims in the state courts and therefore may not raise them for the first time in a federal habeas corpus proceeding. *See, Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270 (1971).

Respondent ignores the fact that the jury rejected his voluntary intoxication defense when it found him guilty of the first degree murder of Joy Faulk. The jury was instructed that it could consider the fact that respondent was voluntarily intoxicated in connection with the ele-

ments of deliberation and premeditation under first degree murder and was told that voluntary intoxication may render a person incapable of forming those mental states (J.A. 193-195). However, the jury found respondent guilty of the first degree murder of Joy Faulk, which indisputably proves that the jury found that respondent's asserted voluntary intoxication[5] did not raise a reasonable doubt as to his guilt of that crime. Respondent has offered no plausible basis for believing that the jury would have accepted his intoxication defense if it were permitted to consider this evidence in connection with the element of malice aforethought even though the jury rejected that defense in connection with the elements of premeditation and deliberation (See U.S. Br. 28). Accordingly, even if respondent had the right to present a voluntary intoxication defense, the instructions on malice could not have prejudiced that defense.

Third, there is no federal constitutional requirement that the states adopt a diminished capacity defense either for mental illness or voluntary intoxication. The Supreme Court on three separate occasions has rejected the argument that a defendant has the constitutional right to present a diminished capacity defense based on mental illness. *See, Fisher v. United States*, 328 U.S. 463 (1946);

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[5]Respondent's voluntary intoxication defense was also quite weak. (See Pet. Br. 22, n. 22). Respondent did not testify at trial, and he offered no direct proof that he was intoxicated at the time of the crimes. The only evidence of his voluntary intoxication was offered through the testimony of the two defense psychiatrists, who based their testimony on respondent's statements to them. Significantly, respondent's supposed amnesia did not disable him from remembering that he was intoxicated at the time in question.

Coleman v. California, 317 U.S. 596 (1942), dismissing appeal for want of a substantial federal question from *People v. Coleman*, 20 Cal.2d 399, 126 P.2d 349 (1942); *Troche v. California*, 280 U.S. 524 (1929), dismissing appeal for want of a substantial federal question from *People v. Troche*, 206 Cal. 35, 273 P. 767 (1928); *cf. Leland v. Oregon*, 343 U.S. at 800-801 (there is no federal constitutional right to present an "irresistible impulse" defense); *see also, Muench v. Israel*, 715 F.2d 1124, 1126-1130 (7th Cir. 1983), cert. denied, No. 83-6358 (June 4, 1984). Congress also rejected that defense for federal criminal prosecutions in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 402 (Insanity Defense Reform Act of 1984), 98 Stat. 2057 (to be codified at 18 U.S.C. 20). *See* S. Rep. No. 225, 98th Cong., 1st Sess. 229 (1983); (U.S. Br. 26 & 26-27, n. 24). Accordingly, if a defendant has no right to present a diminished capacity defense based upon mental illness, which is, of course, involuntarily acquired, then it necessarily follows that there is no right to present that defense where voluntary intoxication is at issue.

Sandstrom adds no support to respondent's claim. As noted above, *Sandstrom* was based upon *In re Winship*, *supra*, and *Winship* does not require the states to define murder in any particular fashion or to accept mental illness and voluntary intoxication as defenses. *See, Patterson v. New York*, *supra*. Respondent has confused the right to present relevant evidence on an element of the crime or an element of a defense—a principle that is neither in dispute nor pertinent to this case—with the claim that the state must define homicide in a manner that makes certain types of evidence relevant—a proposition that also

is not at issue in this case, but which, if it were, would offer respondent no support for his argument.

3. Respondent claims in passing that the instructions on malice may have affected the jury's consideration of first degree murder (Resp. Br. 26-27). However, it is submitted respondent is in error in this regard. The trial court clearly told the jury that, to convict respondent of first degree murder, the state had to prove five separate elements beyond a reasonable doubt, J.A. 184-185, including that the killings were "willful," "deliberate," and "premeditated": *i.e.*, that the defendant acted with the "cool purpose" of an intent to kill that was formed prior to the shootings. The malice instructions could not have affected the jury's findings on these elements of first degree murder.

The trial court, when instructing the jury on malice in connection with first degree murder, defined malice as "the state of mind to do the alleged wrongful act without legal justification or excuse." (J.A. 184-185). The absence of a legal justification or excuse for the *act* of killing plainly has nothing to do with the *mental states* necessary for first degree murder. The trial court's instructions on the elements of willfulness, deliberation, and premeditation could not have been affected by this instruction on malice. That conclusion also holds true when the court's instructions on second degree murder are considered. The trial court explained that express malice was a "wicked intent[,] . . . an intent to do any injury to another, a design formed in the mind of doing mischief to another[,] . . . and exists where a person actually contemplates the injury or wrong he inflicts." (J.A. 186). No reasonable juror would fail to see a difference between

an intent to *injure* someone and the intent to *kill* that person; the contrary conclusion would mean that a reasonable juror could not distinguish between assault and battery, which generally requires only an intent to injure, and murder, which generally requires an intent to kill.[6]

In sum, the trial court's erroneous instructions on malice could not have affected the jury's finding that respondent was guilty of willful, deliberate, and premeditated murder.[7]

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[6]Accordingly, given the jury's findings underlying its first degree murder verdict, the trial court's instructions on implied malice are necessarily harmless, because the jury's verdict shows that it did not rely on these instructions. In any event, the instructions on this issue were also harmless, even considered by themselves.

The trial court defined implied malice as "that condition of the mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief" (J.A. 187), which exists where "the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life," *id.*; *i.e.*, where "there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice." *Id.* Once again, this definition of malice could not have affected the jury's finding that respondent killed willfully, deliberately, and with premeditation because it applies only where a person intends to commit an act with knowledge that the act may jeopardize human life. Obviously, intent to commit an act is entirely different from an intent to produce a *result* of that act, *viz.*, the death of the victim; that difference forms the basis of the distinction between general and specific intent crimes. *See United States v. Bailey*, 444 U.S. 394, 403 (1980).

[7]Respondent also relies on the Tennessee Supreme Court's decision in *State v. Martin*, Shelby Criminal Tennessee Supreme Court Opinion filed December 30, 1985 (not yet published), as support for his claim that the instructions on malice affected the

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C. A Harmless Error Inquiry Is Appropriate

1. Respondent, but neither amicus, claims that the jury instructions on malice amounted to a directed verdict on that question. (Resp. Br. 12-13). However, respondent makes no attempt to claim that the record in this case supports his argument, and the reason why is clear. The state trial court clearly did not direct a verdict of guilty in the state's favor on malice; on the contrary, the court expressly told the jury that it had to decide what, if any, offenses the state had proved and that the state had to prove every element of each offense beyond a reasonable doubt. (J.A. 182-190). In addition, even if a *conclusive* presumption can be treated as a directed verdict—a proposition that the State would dispute, *see* U.S. Br. 14-17—here, only a *rebuttable* presumption is in dispute. Respondent's reliance on *Connecticut v. Johnson*, 460 U.S. 73, 85-86 (1983) (plurality opinion), is therefore misplaced.

There is also no reason to treat the malice instructions in this case as the equivalent of a directed verdict. The jury instructions used here have as ancient a pedigree as the principle that the trial court may not direct a verdict in the government's favor. (See U. S. Br. 16-17). It is

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jury's first degree murder verdict. (Resp. Br. 13, 45-48). However, as noted earlier, *Martin* did not cite, much less distinguish, this Court's ruling in *United States v. Frady, supra*. In any event, to paraphrase *Sandstrom*, while the Tennessee Supreme Court is the final authority on the meaning of malice aforethought under state law, it is not the final authority on the interpretation which a jury could have given the instructions on malice. 442 U.S. at 516-517. For the reasons given in the text, in petitioner's opening brief, and in the U.S. amicus brief, the instructions on malice could not have affected the jury's finding that respondent killed willfully, deliberately, and with premeditation.

implausible to claim that the hundreds of judges who have used these instructions in criminal cases have unwittingly directed verdicts in the state's favor in every case. Whatever force respondent's claim may have as an academic matter, the history of American criminal law clearly proves him wrong.

2. Finally, there is no reason to presume that instructions like these are prejudicial. As discussed above, in petitioner's opening brief, and in the supporting amicus briefs, respondent was not prejudiced by these instructions. Moreover, the federal and state courts have repeatedly, and with near unanimity, found that other defendants were not prejudiced by these instructions. (See U.S. Br. App. 1a-6a; Calif. Am. Br. 35-36 & n. 4). These courts have had no difficulty in distinguishing between the cases, like this one, in which a defendant is not prejudiced and those cases in which the contrary is true. In these circumstances, there is no good reason for denying the State an opportunity to prove that the error was harmless.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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